

This is the second appeal in this case. In a September 18, 2007 decision, the Board affirmed a December 20, 2005 decision of the Office as to fact of overpayment but set aside the decision with regard to the amount of overpayment. The case was remanded for further

development. The Board determined that appellant received an overpayment of compensation from September 4, 1993 to November 22, 2003 because he received dual benefits from the Office and the Department of Veterans Affairs (VA) during that period. However, the Office incorrectly calculated the amount of the overpayment. The Office was directed to make a new determination on the amount of the overpayment. The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.¹

In a fiscal payment worksheet dated November 29, 2007, the Office noted that appellant was paid wage-loss compensation for the period September 4, 1993 to November 8, 1996 in the amount of \$11,572.64, and was paid a schedule award from May 31, 1994 to November 22, 2003 in the amount of \$148,345.38. It determined that from September 4, 1993 to November 22, 2003 appellant had been paid benefits in the amount of \$159,918.02. The Office attached a detailed breakdown for applicable pay rates and gross compensation. Also submitted was an Office payment history inquiry report dated November 16, 2007.

In a November 30, 2007 letter, the Office informed appellant that it had made a preliminary determination that he received a \$159,918.02 overpayment of compensation from September 4, 1993 to November 22, 2003 for which he was not at fault in creating. Appellant received an overpayment of \$159,918.02 in wage-loss compensation and compensation for leave buyback for his left knee condition September 4, 1993 to November 8, 1996 and was paid a schedule award for the period May 31, 1994 to November 22, 2003. He also received an increase in VA benefits for the same injury for the period beginning on August 31, 1993. The Office advised that the overpayment occurred because appellant received compensation benefits from both the Office and the VA during the same period for the same injury. It advised him of his right to submit additional evidence and to request a precoupment hearing. The Office instructed appellant to complete an enclosed overpayment recovery form and submit supporting documentation.

On December 23, 2007 appellant requested a precoupment hearing. He noted that, since 1993, he had accurately reported his VA benefits to the Office but was never informed about prohibited dual benefits. Appellant asserted that he would suffer severe financial hardship if he was required to repay the debt, that he was 65 years old with debilitating health issues and his wife was totally disabled. He requested waiver of the overpayment. Appellant submitted a December 22, 2007 overpayment recovery form with supporting financial documents noting that his monthly income was \$4,662.00 and expenses were \$4,346.00. He noted cash on hand of \$50.00, checking account balance of \$800.00 and his wife had a savings account balance of \$10,000.00.

The hearing was held on April 16, 2008. Appellant noted monthly expenses of \$4,562.90 and monthly income of \$4,662.00. The employing establishment submitted an investigative memorandum dated May 22, 2008 from the U.S. Postal Inspection Service which referenced an October 7, 2004 letter from appellant's attorney to State Farm Insurance Company issuing a demand for \$25,000.00 for injuries sustained in an off-duty motor vehicle accident on August 16, 2003.

¹ Docket No. 06-949 (issued September 18, 2007).

Appellant submitted a May 23, 2008 letter asserting that he and his wife were disabled and could not work. He noted his medication bills had increased over the prior two years and he was unable to make any payments on the debt. Appellant contended that the Office was at fault in creating the overpayment as he was not notified of receiving dual benefits until 2004. He asserted that the recovery would be against equity and good conscience, that he acted on incorrect information from the Office and spent the funds which he would not have otherwise done and would suffer financial hardship if he was required to make repayment. Appellant advised that if waiver of repayment was denied he would have to sell his home, file bankruptcy and be reduced to a lower standard of living.

By decision dated October 20, 2008, an Office hearing representative found that appellant received a \$159,918.02 overpayment of compensation from September 4, 1993 to November 22, 2003 for which he was not at fault. The hearing representative noted that appellant had received an overpayment of \$159,918.02 in wage-loss compensation and leave buyback for his left knee condition for the period September 4, 1993 to November 8, 1996 and was paid a schedule award from May 31, 1994 to November 22, 2003 while also receiving an increase in VA benefits for the same injury for the period beginning on August 31, 1993. The hearing representative denied waiver of the overpayment, finding that recovery of the overpayment would not defeat the purpose of the Act or would it be against equity and good conscience. The hearing representative directed repayment of the overpayment at the rate of \$1,000.00 per month.

LEGAL PRECEDENT -- ISSUE 1

Section 8116(a) of the Federal Employees' Compensation Act² states:

“(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--

- (1) in return for service actually performed;
- (2) pension for service in the Army, Navy or Air Force;
- (3) other benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death; and
- (4) retired pay, retirement pay, retainer pay or equivalent pay for service in the Armed Forces or other uniformed services....

“However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the [g]overnment, does

² 5 U.S.C. § 8116(a).

not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.”³

Section 8116(b) provides that in such cases an employee shall elect which benefits he shall receive. Thus, the Act prevents payment of dual benefits in cases where the Office has found that the disability was sustained in civilian federal employment and the VA has held that the same disability was caused by military service.⁴

ANALYSIS -- ISSUE 1

Following the prior appeal, the Office provided a detailed breakdown for appellant’s pay rates and gross compensation from September 4, 1993 to November 22, 2003 and included a payment history inquiry report on November 16, 2007 in support of the overpayment calculation. From September 4, 1993 to November 8, 1996 appellant received \$11,572.64 in wage-loss compensation and leave buyback and from May 31, 1994 to November 22, 2003 he received \$148,345.38 for a schedule award for his accepted work-related conditions of left knee strain, aggravation of osteoarthritis of the left knee. He was not entitled to the wage-loss compensation or the schedule award for the left knee injury because he had elected to receive VA benefits for the left knee injury. This dual payment of benefits created an overpayment of \$159,918.02.

The Office properly determined that from September 4, 1993 to November 22, 2003 appellant received an overpayment of \$159,918.02 due to his receipt of dual benefits from both the Office and the VA for the same injury. Appellant does not dispute that he received the overpayment in question nor does he dispute the amount of the overpayment. The Board finds that the Office properly determined the amount of the overpayment that covered the period September 4, 1993 to November 22, 2003.

LEGAL PRECEDENT -- ISSUE 2

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.⁵ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of the Act; or (2) adjustment or recovery of the overpayment would be against equity and good conscience.⁶

Recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom the Office seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary’s assets do not exceed a specified amount as determined by the Office from data

³ *Id.*

⁴ *Sinclair L. Taylor*, 52 ECAB 227 (2001); *Allen W. Hermes*, 43 ECAB 435 (1992).

⁵ 20 C.F.R. § 10.433(a).

⁶ *Id.* at § 10.434. See *Keith H. Mapes*, 56 ECAB 130 (2004).

furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.⁷ Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.⁸ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.⁹

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.¹⁰

ANALYSIS -- ISSUE 2

The Office determined that appellant was without fault in the creation of the overpayment. Because he is without fault, the Office may adjust later payments only if adjustment would not defeat the purpose of the Act or be against equity and good conscience.

Appellant was advised by the Office to provide the necessary financial information if he desired waiver. The Office sought financial information and documentation to help determine whether recovery would defeat the purpose of the Act or would be against equity and good conscience. The information provided by appellant in the overpayment recovery questionnaire revealed that he had monthly expenses which included, rent or mortgage of \$889.05, automobile leases of \$599.58, credit cards of \$235.00, newspaper of \$12.80, air-conditioning contract of \$10.00, cable of \$58.51, electric of \$220.00, telephone of \$120.00, water/sewer of \$85.00, SBA loan of \$44.00, termite protection of \$41.50, insurance (home and automobile) of \$343.00, taxes of \$45.00, pool services of \$65.00, fuel/cars of \$200.00, food of \$525.00, miscellaneous household expenses of \$250.00, dental of \$95.00, medical insurance of \$280.00, medical expenses of \$90.00 and clothing of \$125.00 for a total of \$4,333.27¹¹ per month. The questionnaire noted that appellant earned \$2,600.00 in compensation benefits from the VA, \$1,522.00 from social security benefits and \$540.00 from the Office of Personnel Management for a total of \$4,662.00.¹² Appellant noted assets that included cash of \$50.00, check account balance of \$800.00 and savings account balance for his wife of \$10,000.00. At the hearing on

⁷ *Id.* § 10.436.

⁸ *Id.* at § 10.437(a).

⁹ *Id.* at § 10.437(b).

¹⁰ *Id.* at § 10.438(a). See *Keith H. Mapes, supra* note 6.

¹¹ The Board notes that there was an addition error and the total expense amount was \$4,333.44.

¹² The Board notes that analyzing the overpayment questionnaire of December 22, 2007 appellant's income exceeds his expenses by \$316.00. In analyzing appellant's monthly expense worksheet of May 23, 2008, his income exceeds his expenses by \$100.00.

April 16, 2008, and subsequently, appellant listed additional expenses for mortgage, household bills to bring his listed monthly expenses to \$4,562.90.¹³ With total income of \$4,662.00 and expenses of \$4,562.90, the record establishes that his current income exceeds his monthly expenses by more than \$50.00. Therefore, he is not deemed, pursuant to Office procedures, to need substantially all of his income to meet his ordinary and necessary living expenses.¹⁴ Because appellant has income which exceeds his monthly expenses by more than \$50.00, the Board concludes that appellant has failed to demonstrate that recovery of the overpayment would defeat the purposes of the Act.¹⁵

With respect to whether recovery would be against equity and good conscience, section 10.437(a)(b) of the federal regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual would experience severe financial hardship in attempting to repay the debt or, in reliance on such payments or on notice that such payments would be made, relinquished a valuable right or changed his position for the worse.

Appellant asserts that he notified the Office on several occasions of his receipt of VA benefits and reported the income annually on CA-1032 forms. He further advised that he was never informed by the Office that he was not permitted to receive both VA and Office benefits. Appellant indicated he was without fault in the creation of the overpayment, rather it was the fault of the Office as he was not notified of receiving dual benefits until 2004 when benefits expired.¹⁶ He asserted the recovery would be against equity and good conscience, that he acted on incorrect information from the Office and spent the funds which he would not have otherwise done and would suffer financial hardship if he was required to make repayment. However, the evidence does not show that appellant would experience severe financial hardship in attempting to repay the debt.¹⁷ Although appellant asserted that he acted on incorrect information from the

¹³ The hearing representative found that the additional expenses were “in line” with appellant’s earlier listed expenses except for the mortgage amount. The Board notes that on December 22, 2007 appellant noted on the overpayment recovery questionnaire that his mortgage payment was \$889.05 per month and submitted a Chase Mortgage Loan Statement dated November 3, 2007 supporting this figure. On May 23, 2008 appellant submitted an overview of monthly expenses which reflected a mortgage payment of \$1,099.05; however, he provided no supporting documentation for this amount. As appellant’s monthly income, using the higher mortgage amount, still exceeds his monthly expenses by more than \$50.00, as addressed *infra*, this discrepancy in mortgage amount does not affect the waiver determination.

¹⁴ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1) (October 2004) (an individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00).

¹⁵ See *id.* (noting that claimant must show both that he or she needs substantially all of his or her current income to meet current ordinary and necessary living expenses; and that his or her assets do not exceed the applicable resource base in order to establish that recovery of the overpayment would defeat the purpose of the Act).

¹⁶ Although the Office found that appellant was without fault in the matter of the overpayment, repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience. See *Keith H. Mapes*, *supra* note 7.

¹⁷ The factors to be considered in making a financial hardship determination are the same as those considered in determining whether recovery of the overpayment would defeat the purpose of the Act. See *id.*, at 6.200.6(b).

Office and spent the funds which he would not have otherwise done, he failed to submit evidence substantiating that he relinquished a valuable right that he was unable to get back or that his action was based chiefly or solely on reliance on payments or notice of payment.¹⁸ Appellant has not established that, if required to repay the overpayment, he would be in a worse position after repayment than would have been the case if the benefits had never been received in the first place.¹⁹ The Board finds that recovery of the overpayment would not be against equity and good conscience since there is no evidence of record from which to conclude that appellant relied on his incorrectly calculated compensation payments to relinquish a valuable right or change his position for the worse.

As appellant has not shown that recovery would “defeat the purpose of the Act” or would “be against equity and good conscience,” the Board finds that the Office properly denied waiver of recovery of the overpayment. Thus, appellant does not qualify for waiver by reason of financial hardship. Further, appellant did not argue or submit evidence to establish that recovery of the overpayment would be against equity or good conscience because, or that in reliance on the overpaid compensation, he relinquished a valuable right or changed his position for the worse.

The Board further finds that it does not have jurisdiction to review the Office’s determination that the overpayment of compensation would be recovered through payments of \$1,000.00 a month. It does not appear from the record that appellant is receiving continuing compensation benefits. The Board’s jurisdiction to review recovery of an overpayment is limited to the situation where recovery is made from continuing benefits.²⁰

CONCLUSION

The Board finds that appellant received an overpayment of \$159,918.02 in compensation from September 4, 1993 to November 22, 2003. The Board also finds that the Office did not abuse its discretion in denying waiver of the overpayment.

¹⁸ See 20 C.F.R. § 10.438(a) (it is the responsibility of the overpaid individual to provide evidence of income, expenses and assets that will be used in determining whether the overpayment may be waived).

¹⁹ See Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (May 2004).

²⁰ See *Rose Carye*, 50 ECAB 482, (1999); *Lewis George*, 45 ECAB 144 (1993); *Levon H. Knight*, 40 ECAB 658 (1989); *Edward O. Hamilton*, 39 ECAB 1131 (1988).

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 15, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board